STATE OF MICHIGAN

IN THE SUPREME COURT

NATIONAL WILDLIFE FEDERATION & UPPER PENINSULA ENVIRONMENTAL COUNCIL,

Plaintiffs-Appellees,

vs

Supreme Court
No. 121890

CLEVELAND CLIFFS IRON COMPANY & EMPIRE IRON MINING PARTNERSHIP,

Defendants-Appellants,

and

Court of Appeals
No. 232706

MICHIGAN DEPT OF ENVIRONMENTAL QUALITY, a Michigan Executive Agency and RUSSELL J. HARDING, Director of the Michigan Department of Environmental Quality,

Defendants,

Marquette County Circuit Court
No. 00-037979-CE

_____/

REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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THE MICHIGAN LEGISLATURE CAN NOT CONFER BY STATUTE STANDING ON A PARTY WHO DOES NOT SATISFY THE JUDICIAL TEST FOR STANDING AS RECOGNIZED BY THIS COURT IN *LEE v MACOMB COUNTY BOARD OF COMMISSIONERS.*

A. The Judicial Test For Standing Is Grounded In Michigan's Constitution, With Its Provisions Vesting Distinct Powers In Three Distinct Branches Of Government And Barring Persons Exercising The Powers Of One Branch To Exercise The Powers Of Another Except As Expressly Provided In The Constitution.

The issue presented to this Court goes to the heart of the Michigan Constitution's structural provisions. The Michigan Constitution contains three clauses vesting the legislative, executive, and judicial power in distinct branches of government. Article 4, § 1 provides:

> The legislative power of the State of Michigan is vested in a senate and a house of representatives.

Article 5, § 1 provides:

> The executive power is vested in the governor.

Article 6, § 1 provides:

> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected thereto and serving in each house.

The vesting clauses in the Michigan Constitution mirror those in the federal constitution. Both constitutions have three clauses which vest power in three branches of government. This structure underscores the framers' intent of creating distinct branches of separated power. Mich Const 1963, art 4, § 1; art 5, § 1; art 6, § 1; US Const, art I, § 1; art II, § 1; art III, § 1.

But the framers of the Michigan Constitution did not simply rely on the structure to create a system of separated powers. They included language explicitly mandating a separation of powers between the branches. In article 3, § 2, the Michigan Constitution provides:

> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

> This language placed limits on the activity of those in each branch, barring them from exercising powers that belong to another of the branches. It provides an even stronger textual clue to the need to ensure that one branch does not exercise the powers of another than exists in the federal constitution.

The standing doctrine, which limits lawsuits to matters within the judicial power, helps to give meaning and effect to the structure and text of the Constitution. This Court acknowledged the constitutional basis for the standing doctrine in its decision in *Lee v Macomb County Board of Comm'rs*, 464 Mich 727; 629 NW2d 900 (2001).

According to *Lee*, "standing is of great consequence so that neglect of it would imperil the constitutional architecture whereby governmental powers are divided between the three branches of government." 464 Mich at 735. The *Lee* Court described the "role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." 464 Mich at 735-736. This Court embraced the standing test that had been previously recommended by Justice Cavanagh and Boyle, noting that it provided "the clearest template" for determining the essential elements necessary to invoke the judicial power to resolve a claimed dispute. 464 Mich at 739 citing *House Speaker v Governor*, 441 Mich 547, 554; 495 NW2d 539 (1993). In

doing so, the *Lee* Court adopted the standing test of *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992).[1]

The standing doctrine serves to limit the judiciary to deciding cases within the "judicial power"; it prevents the judiciary from encroaching on the executive or legislative power. This limitation is grounded in both the text and structure of the Michigan constitution. In assigning power to the governor, the Michigan Constitution is clear that "[t]he executive power" is vested in "the governor." The word "execute" means to carry out fully or to put completely into effect or to do what is provided or required by a decree. *Webster's Ninth New Collegiate Dictionary* (1985). The word "executive" has been defined as "designed for or relating to execution or carrying into effect." *Id.* A variant meaning is "of or relating to the execution of the laws and the conduct of public and national affairs; belonging to the branch of government that is charged with such powers ..." *Id.* The governor is thus vested with the power to carry into effect the laws and the conduct of public affairs.

Under the Michigan Constitution, it is "the governor" (a single unitary executive official) who is vested with "the executive" power. The provision uses the article "the" twice, once to modify governor, and once to modify executive power. This Court has noted that "traditionally in our law, to say nothing of our classrooms, we have recognized the difference between 'a' and 'the.'" *Robinson v Detroit*, 462 Mich 439, 461; 613 NW2d 307 (2000). This Court has concluded, based on the definition of "the," that "used esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a

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[1]The only member of the Court who did not agree with the adoption of *Lujan* as the test for standing was Justice Weaver. Justice Weaver concurred with the result but announced her view that Michigan standing requirements are based on prudential, rather than constitutional, concerns. 464 Mich 742 (Weaver, J, concurring). Justice Kelly wrote a dissent in which she "agreed with the majority's adoption of the *Lujan* test," but could not "agree that plaintiffs' lack standing." 464 Mich 747, Kelly, J, dissenting. Justice Cavanagh concurred with her in dissent.

or an," its use means "one." 462 Mich at 461-62 quoting *Random House Webster's College Dictionary*, p 1382. Thus, use of the definite article "the" before governor makes clear that the constitution created a single governor. And use of the definite article "the" to modify "executive power" makes clear that all of the power defined as "executive" is granted to the governor, who is granted the authority and right to exercise "the executive power." Thus, the text confirms that a single unitary executive is vested with all of the executive power. It is not to be shared, except as specified in other provisions of the constitution.

Defendants-appellants' interpretation is strengthened by the three distinct sections creating three distinct branches of government, and by the separation of powers provision. These provisions make clear that the powers of one branch do not encompass powers vested in another branch. National Wildlife seeks to invoke this Court's jurisdiction not to bring before it a concrete individuated right giving rise to a legal dispute the resolution of which is within the judicial power. Instead, National Wildlife seeks to invoke the Court's jurisdiction, in essence, to veto the decision of the executive branch although National Wildlife has not shown a concrete individuated interest that can be remedied by the judicial power. In effect, National Wildlife is urging the judiciary to exercise power of the executive branch. This is barred by the standing doctrine as a matter of constitutional law.

Montesquieu set forth the rationale for the separation of powers in words that are instructive here:

> [T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor.

Montesquieu, *Spirit of the Laws* (1748) as quoted in Malcolm P. Sharp, *The Classical American Doctrine of 'The Separation of Powers*," 2 U Chi L R 385 (1935). Madison, Hamilton, Jefferson, and others of the constitutional era believed that the separation of powers was essential to avoiding despotism. But this separated powers system also included a system of checks and balances by which the various branches would interact. These checks and balances were carefully created to safeguard the people from tyranny. Sharp, at 399-405. Madison pointed out that the "only practicable way to provide for the separation of powers was to give each department the incentive and strength to resist the encroachments of the other." Sharp, at 407. Madison feared legislative bodies, favoring a strong executive to counteract the natural strength of the legislative body. *Id.* at 408-409. Madison feared that the weight of the legislature could overpower the executive and he sought to design a system to provide defenses against this.

The judicial power was not so feared—but only because it was constrained by the limits of its decisionmaking power. Thus, Montesquieu said "the judiciary is in some measure next to nothing." Sharp, at 390 quoting Montesquieu, *Spirit of the Laws* (1748). Wilson, another founding era statesman, spoke about the judicial role and distinguishing it from executing the laws:

> The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by parties interested in them.

Sharp, at 414 quoting James Wilson's *Lectures*, 1790-1791.[2] Wilson cautioned that "every degree of confusion in the plan will produce a corresponding degree of interference, opposition, combination, or perplexity in its execution." Sharp, at 414 quoting James Wilson. The

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[2]Farrand credits Madison and James Wilson with the greatest influence besides Washington's in securing adoption of the federal constitution. Farrand, *The Framing of the Constitution of the United States*, 196-199 (1913) as cited by Sharp, at 411.

"constitutional architecture" of Michigan's tripartite structure, like that of the federal government, depends on the maintenance of traditional boundaries to the scope of the judicial power. National Wildlife's position, if accepted, would allow the legislature to weaken the executive by transferring executive power to the judiciary.

In arguing against this approach, the Attorney General,[3] National Wildlife, and various amici insist that standing lacks a constitutional basis or suggest that any constitutional limits do not apply here. They raise a number of other arguments that amount to an attack on this Court's decision in *Lee*, or an effort to limit it by distinguishing any situation in which the legislature has enacted a statute purporting to grant a litigant a right to bring suit. These arguments should be rejected. In none of the briefs filed in this Court do any of the parties provide a textual discussion of the meaning of the Michigan Constitution's vesting clauses, or of the limits to judicial power that they create. Instead, they simply focus on the absence of "case or controversy" language. They also point to decisional authority recognizing that Michigan is not bound by federal law, suggest that *Lujan* is inconsistent with traditional standing doctrine, or argue that it does not apply here. The opposing briefs provide no alternative interpretation of the constitutional text that would support a different result. Thus, *Lee* controls and bars a suit unless the litigant can satisfy the judicial test for standing.

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[3]The Attorney General is not properly designated as an appellee here but is more appropriately considered am amicus supporter of the position advanced by National Wildlife insofar as it supports recognition of a legislative power to confer standing on a litigant without the litigant's demonstrating that it satisfies the judicial test for standing. The Attorney General's position in the lower court was supportive of Cleveland Cliffs and Empire Mining Partnership because the MDEQ issued a permit to them. The MDEQ agreed that the preliminary injunction sought by National Wildlife should be denied because they were unlikely to succeed on the merits where the permit was validly issued. Only in the Court of Appeals did the Attorney General, on behalf of MDEQ, shift to indicate support for one aspect of National Wildlife's position.

B. Historically, The Judicial Power Did Not Encompass Cases In Which The Plaintiff Had Only An Abstract, Self-Contained, Non-Instrumental Right That Was Common To All.

A major theme of the plaintiffs-appellees' response brief is their suggestion that historically, suits were often permitted without a litigant demonstrating any personal stake or interest in the outcome. (Plaintiffs-Appellees' Brief on Appeal, pp 9-10, 19-23). Plaintiffs-appellees point to the prerogative writs, to the existence of qui tam actions, and to the availability of writs of mandamus or certiorari as early as 1850. Plaintiffs-appellees and amici rely on a series of scholars, whose discussion of this history can be traced to articles by Professor Louis L. Jaffe and Professor Raoul Berger. Louis L Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv L R 1265 (1961); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 Yale L J 816 (1969). Jaffe and Berger's conclusions have been "eagerly accepted by legal scholars" including Professor Steve L. Winter, Professor Cass Sunstein, Professor Gene R. Nichol, Jr., and others. See Steve L Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan L R 1371 (1988); Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich L R 163 (1992).

But these scholars' contention that *Lujan's* standing test is inconsistent with the historical understanding of judicial power is not born out by a study of the early English legal authorities on which their position was supposedly based. See Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 Brooklyn L R 1001 (1997). A review of the early English decisions involving prerogative writs to reveal "that 'standingless' proceedings were not commonplace, as Professors Jaffe and Berger concluded, but that a 'personal stake' or standing was indeed necessary to invoke the power of English courts in prerogative proceedings during the eighteenth century." Clanton, at 1008. The writings of early English legal scholars, such as Bacon or Wood, reveals that the writs were available only to those who had been injured

or had an interest in the matter at stake. 4 Matthew Bacon, *A New Abridgement of the Law* (1736); Thomas Wood, *An Institute of the Laws of England* (3d ed 1724).

The error in Berger and Jaffe's analysis apparently stems from their erroneous understanding of the use of the term "stranger" in some early decisions and law books. Contrary to Berger and Jaffe's conclusions, the early cases did not use the term to mean someone without an interest. The term "stranger" encompassed non-parties - but not those with no interest in obtaining the writ. *Id.* at 1009. A "stranger" was one with "either a present or a future right." Clanton quoting Giles Jacob, *A New Law Dictionary* (5th ed 1744); Richard Burn, *A New Law Dictionary* (1792). In one early English decision, for example, Justice Blackburn explained that "a stranger has in general no right to require our interference; but if he shews that he is aggrieved and has sustained damage, then, ex debito justitiae, as in any other suit, he has the right to our opinion upon the question." *Forster v Forster & Berridge*, 122 Eng Rep 430 (1863).

Careful scrutiny of the decisions relied on by Berger and Jaffe, reveals that "the eighteenth century English practice is consistent with Justice Scalia's assertion that the 'personal stake' requirement of the standing doctrine is grounded 'upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.'" Clanton, at 1032. Likewise, historical analysis of the writ of prohibition, the writ of mandamus, or other early actions reveals that the courts required a personal interest in order for a litigant to proceed. Nor does the existence of quo warranto, mandamus, or other such actions in the eighteenth century undercut the standing requirement or suggest that it is not constitutionally-based. Study of legal history confirms that such actions were not permitted without a showing of individual interest. The legal scholars most associated with the attack on Justice Scalia's history are those who

advocate a "public rights" or "public litigation" approach despite the frail historical foundation for it. Clanton, at 1007, 1048-1049.

Their views should be rejected - at least insofar as they are based on an argument from legal history because the "history" is inaccurate. And their policy-based arguments in favor of public litigation standing should also be rejected. First, the constitutional limits to the judiciary's powers cannot be ignored on the basis of public policy. Second, the policy itself is questionable since such public litigation can interfere with and divide the executive power, slowing the governor's ability to implement and effectuate the laws. It may also risk self-interested behavior by private parties litigating not for the public interest but to further some private interest of their own, a risk that is generally held in check by executive law enforcement and implementation. See generally, Harold J. Krent and Ethan G. Shenkman, *Of Citizen Suits & Citizen Sunstein*, 91 Mich L R 1793 (1993). Third, it may cause over-enforcement of the law by the bringing of extremely weak suits such as this one. Such an outcome consumes judicial resources, executive branch resources, and the resources of entities such as defendants-appellants needlessly defending against suits challenging executive decisions of various kinds.

In addition, careful reading of the early Michigan decisions relied on by National Wildlife reveals that they too support defendants-appellants' position on appeal. *People ex rel Drake v Regents of University of Michigan*, 4 Mich 98 (1856) does not suggest that the legislature may confer universal standing or that a litigant was historically permitted to sue without showing a personal interest. In *Drake*, this Court reviewed English legal history and announced, "We find no case decided by the English courts which sanctions this action of their courts on an application of this character, upon the sole motion of a private citizen of the realm."

4 Mich at 102. This Court inferred from its study of English legal history that the practice of allowing citizens at large to sue was "never sanctioned by their courts." *Id.*

The *Drake* Court found two decisions from other state courts allowing such suits; but more decisions from other state courts required a showing of an individual interest. According to this Court, these states had held that "to entitle an individual citizen to be heard as a relator and on his own motion, he must show that he has some individual interest in the subject matter of the complaint which is not common to all citizens of the state..." 4 Mich at 103. This Court was not prepared to say that a "case may not arise in which this court would allow an individual to file such a suit...." *Id.* But this limited dictum, recognizing that the Court was not deciding all future cases, is a slim reed on which to hang an argument that Michigan precedent supports suits without a showing of standing. Although the Court went on to discuss the constitutional issue presented, it made clear that it was doing so merely to address all issues presented. At the same time, the Court emphasized that while a case might be made out to seek a writ of mandamus, "the case made out is not one which would authorize the further action of this court at this time." 4 Mich at 105. The decision supports defendants-appellants' contention that Michigan courts, like early English courts, have traditionally required a litigant seeking to pursue a matter in court to show that he or she "has some individual interest in the subject matter of the complaint which is not common to all the citizens of the state." 4 Mich at 104.

Likewise, *People ex rel Ayres v Bd of State Auditors*, 42 Mich 422; 4 NW 274 (1879) supports defendants-appellants' position. There, this Court stated in general terms that the relator bringing the suit lacked "any greater legal interest than other citizens, if the application must be made by an interested party." 42 Mich at 429. The Court then differentiated the relator (whose interest was no greater than other citizens) from "an officious interloper" whose suit

would not be entertained. The Court explained that the relator was engaged in "a business which would make him a competent bidder [for the publication project that was under dispute], and that he desires to become a bidder if the interest is set up for competition...." *Id.* This removed him, in the Court's view, "form the position of an officious interloper, and gives him sufficient assurances that the controversy is genuine and in good faith." *Id.* The Court's decision does not illustrate the judicial entertainment of a suit without an individual interest. To the contrary, the relator could readily satisfy the judicial test for standing at issue here and the Court expressly so found before considering the merits of the dispute.

The history of writ practice, in England or in Michigan, does not suggest that suits may be brought by those with no individuated interest. To the contrary, neither National Wildlife nor amici have pointed this Court to authority allowing such suits to proceed where the plaintiff fails to show that he or she satisfies the judicial test for standing. Nor does their citation of art 6, § 6 support the conclusion that the constitutional mention of writ practice means that a litigant need not satisfy the judicial test for standing. Article 6, § 6 merely provides:

> Decisions of the Supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

Const 1963, art 6, § 6.[4] Writs of mandamus were used to require the executive branch to comply with the law. But, litigants seeking a prerogative writ satisfied the standing test because they had some injury requiring judicial correction. This limit has been historically recognized. It stems from the nature of judicial power.

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[4]Plaintiffs-appellees' Brief on Appeal cites article 6, § 16, which must be a typographical error since that provision pertains to probate judges.

Justice Marshall's discussion of the judicial power in *Marbury v Madison*, 5 US 137; 2 L Ed 2d 60 (1803) illustrates this and lends further support to the defendants-appellants' position. When considering whether to grant a writ of mandamus, Justice Marshall emphasized the deference due to executive officials and the delicacy with which the judiciary must consider claims brought against executive officers. 5 US at 169-170. He explained that the "province of this court is, solely, to decide the rights of individuals, not to enquire how the executive, or executive officers, perform their duties in which they have a discretion." 5 US at 170. Only when a citizen asserted legal rights (and was not an intermeddler) would the judiciary consider the case. Justice Marshall explained that the judiciary would reject suits that failed to fall within the scope of their authority and that were therefore appropriate to their role within the constitutional structure:

> Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated that any application to a court to control, in any respect, his conduct, would be rejected without hesitation."

5 US at 171. Justice Marshall then explained that the judiciary would entertain suits involving the rights of individuals:

> But where he [the executive official] is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such a record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of the department.

5 US at 171. Justice Marshall's discussion fits well with the standing test as articulated in *Lujan* and by this Court in *Lee*. When asked to interfere with the executive's exercise of executive

power, the judiciary is placed in a difficult role and one that calls for great delicacy. Absent an injured individual with a right to relief, the judiciary should reject an effort to invoke its jurisdiction. Here, National Wildlife has failed to show any injured individual with a right to relief. Thus, this Court should not hesitate to reject its effort to invoke the judiciary's jurisdiction in this case.

C. Judicial Enforcement Of The Limits To Judicial Power Embodied In The Standing Doctrine Does Not Amount To Interference With The Legislature's Historic Right To Create A Cause Of Action.

National Wildlife and various amici also argue that enforcement of the limits to judicial power that are embodied in the standing doctrine interferes with the legislature's historic right to create a cause of action. But that is not so. The legislature may enact private enforcement schemes by creating private, individuated interests, or it can rely on public enforcement. But the legislature may not enact a statute purporting to confer an un-individuated right to challenge executive decisions (such as the permitting decision at issue here) without a showing of actual injury. Unless the judiciary enforces the boundary to its powers that is embodied in the standing doctrine, nothing will prevent the legislature from chipping away at the governor's executive power to implement and enforce the law. If the legislature is permitted to confer standing on individuals to sue for this and myriads of other executive decisions, it will distort the carefully calibrated balance of powers that was embodied in our constitution.

The Supreme Court discussed when a legislative conferral of standing goes too far in *Lujan*. The *Lujan* Court explained that a citizen-suit provision of a federal statute cannot satisfy the actual injury requirement by congressional conferral:

> This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact

> statement before a federal facility is constructed next door to them). Nor is it simply a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff.

Lujan, 504 US at 572. The *Lujan* Court differentiated these illustrations of litigation in which a private plaintiff could show that it had standing to proceed. The lawsuit at issue in *Lujan* was one in which "the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Id.* The *Lujan* Court explicitly rejected the lower court's view.

The *Lujan* Court's rationale is illustrative of the proper analysis here. The court noted that to "permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art II, § 3." 504 US at 577. In other words, Congress would be enabling the courts to "assume a position of authority of the governmental acts of another and co-equal department,' ... and to become 'virtually continuing monitors of the wisdom and soundness of Executive action.'" 504 US at 577 quoting *Massachusetts v Mellon*, 262 US 447, 489; 435 S Ct 597; 67 L Ed 1078 (1923) and *Allen v Wright*, 468 US 737; 104 S Ct 3315; 82 L Ed 2d 556 (1984).

When the United States Constitution was enacted, its drafters intended to ensure a sufficiently strong government to deal with both internal and external threats. The Federalist Papers make clear that the unitary executive was seen as "essential to the protection of the community from foreign attacks; it is not less essential to the steady administration of laws."

The Federalist No 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed, 1961). In accord with this philosophy, the founders rejected efforts to split the executive into more than one position. They sought to create a structure that would prevent the legislative authority from encroaching on the other branches. See The Federalist No. 71, p 433 (Alexander Hamilton) ("The tendency of the legislative authority to absorb every other has been fully displayed and illustrated by examples in some preceding numbers. In governments purely republican, this tendency is almost irresistible.") In other words, a strong, steady, single executive was empowered to carry out the laws.

Likewise, the Michigan Constitution contemplates a strong single executive, the governor, who is "vested with the executive power." Nothing in this provision allows other branches the power to execute and implement the laws. The separation of powers provision underscores this textual reading. A legislative conferral of standing without a showing that a litigant meets the judicial test for standing amounts to a legislative transfer of executive power to the judiciary. This upsets the balance of power so carefully crafted in the three branches government. And it allows the legislature, and the judiciary, to chip away at "the executive power," a part of which is the implementation of laws like the environmental statute at issue here.

Nothing in the statute at issue here amounts to a legislative creation of a cause of action giving an individuated right to all citizens to seek judicial relief. National Wildlife has pointed to no individuated right on the part of any of its members. Instead, National Wildlife seeks to vindicate the "public right" to a clean environment by challenging the MDEQ's implementation of MEPA. National Wildlife failed to satisfy the judicial test for standing. It has not identified any individuated interest that has been injured by the MDEQ decision. The legislature may

create a cause of action by enacting a statute that gives rise to a private individuated interest. But it cannot confer standing on a litigant without such an interest. Thus, this Court should squarely hold that the legislature may not confer standing on a litigant unless the litigant is able to satisfy the judicial test for standing.

National Wildlife insists that the "power to say who may bring a lawsuit and under what circumstances is widely acknowledged to be a legislative one." (Plaintiffs-Appellees' Brief on Appeal, p 29). National Wildlife cites *Sizemore v Smock*, 430 Mich 283; 422 NW2d 666 (1988) to illustrate the proposition that courts can establish new causes of action but also recognize that "such action is ordinarily a legislative one." (Plaintiffs-Appellees' Brief on Appeal, p 29). National Wildlife then announces that throughout "most of the history of Michigan and federal case law, there was no separate analysis of standing as opposed to a cause of action." (Plaintiffs-Appellees' Brief on Appeal, p 30).

National Wildlife conflates the power to establish standing with the power to create a cause of action. These concepts are not identical. To the contrary, the one is a requirement enforced by the courts that stems from the constitutional text and structure and marks the limits of the "judicial power." The other is the notion that the legislature can create individuated legal interests in individuals, akin to common-law causes of action, that entitle them to legal relief in the court when they have been deprived of these interests. (Plaintiffs-Appellees' Brief on Appeal, pp 29-35). Each is a distinct concept: one that is within the purview of the courts and the other within the purview of the legislature.

National Wildlife's position must therefore be rejected because its fundamental premise, that the legislature' s right to create a cause of action is the same as a right to confer standing, is erroneous. Contrary to National Wildlife 's position, the judiciary should not defer to the

legislature when determining whether a matter is properly brought to the courts for judicial resolution. That decision is properly part of the judiciary's determination of its own jurisdiction as a matter of constitutional law.

Michigan courts have not "uniformly recognized that legislatures have the power to set standing requirements." (Plaintiffs-Appellees' Brief on Appeal, p 30). And the only Michigan decisions cited in support of this proposition do not so hold. *House Speaker v Governor*, 443 Mich 560; 506 NW2d 190 (1993), for example, did not announce that universal standing is available at the behest of the legislature. To the contrary, this Court relied on a court rule, MCR 2.201(B)(4)(a) to support standing because two plaintiffs satisfied the requirements of the rule. This taxpayer standing rule provides no authority for concluding that this Court has recognized that the legislature may confer standing. It did not involve a legislative grant of standing to all taxpayers but the application of a court rule.

Nor did *Ray v Mason Drain Comm'r*, 393 Mich 294; 224 NW2d 883 (1975) so hold. Although the Court stated that MEPA "provides private individuals and other legal entities with standing to maintain actions in the circuit courts for declaratory and other equitable relief," that aspect of its discussion was unnecessary to the decision, and mentioned as part of a lengthy recitation of the MEPA's requirements and other provisions. The Court in no way suggested that it intended to abrogate Michigan's standing doctrine or to interpret MEPA to dispense with a showing of actual injury.

National Wildlife insists that the legislature may create new legal rights and provide that they are judicially enforceable. (Plaintiffs-Appellees' Brief on Appeal, pp 34-36). Defendants-appellants do not disagree. But National Wildlife is wrong to suggest that this means that it may

also confer standing on an individual to bring suit without any showing of actual injury arising out of an individuated interest of that individual. It does not.

National Wildlife also suggests that the duty to determine whether an interest is "of sufficient importance to warrant the expenditure of judicial resources" lies with the legislature and not with the courts. (Plaintiffs-Appellees' Brief on Appeal, p 34). National Wildlife's discussion blurs the analysis to suggest that the standing test is akin to legislative line-drawing and thus demands allocation of the decision of whether the suit may be brought to the legislature, not the judiciary. This argument is also based on a confusion between standing as a constitutionally-grounded doctrine that limits the reach of the judiciary on the basis of the boundaries embodied in the notion of "judicial power" and line-drawing that is appropriate for the legislature in enacting statutes that may create a private right of action. The standing doctrine is not intended to evaluate how "important" an "interest" is. It asks whether the litigant bringing suit has suffered actual injury of that litigant's interest. That differs from a legislative determination, for example, that a litigant has a right to bring suit if a building inspector negligently inspects a house leaving a construction defect that causes injury to the litigant. In the first case, the legislature is not permitted to override the judicial test for standing. In the second, the legislature may choose to create an individual interest to non-negligent building inspection that forms the basis for suit; or it may choose not to create such a right.

National Wildlife suggests that a majority of the Supreme Court agree that "Congress may establish such rights, specify what will amount to an injury to such rights, and provide a judicial remedy for those rights." (Plaintiffs-Appellees' Brief on Appeal, p 35). But the comment from Justice Kennedy's concurrence is far more limited than National Wildlife's reading of it. Justice Kennedy merely observed that the Court should "be sensitive to the

articulation of new rights of action that do not have clear analogues in our common-law tradition." 504 US at 580 (Kennedy, J, concurring). Even so, nothing in that observation suggests that such new rights of action can completely dispense with any individuated interest. And the holding of *Lujan*, with which Justices Kennedy and Souter concurred, does not allow for such a reading since the Court specifically held that such a statutory provision conferring standing was insufficient to satisfy the judicial test for standing.

D. A Proper Reading Of The Michigan Constitutional Provision Relating To The Protection Of The Environment Must Harmonize It With Other Provisions In The Constitution Including Those That Give Rise To The Standing Doctrine.

National Wildlife and various amici also argue that the Michigan constitutional provision regarding protection of natural resources "specifically authorized the Legislature's grant of standing under the Michigan Environmental Protection Act." (Plaintiffs-Appellees' Brief on Appeal, p 40). But this argument finds no support in the text and must be rejected. The article that National Wildlife relies on falls within article 4, the article that sets forth the legislature's powers. Article 4, § 52 provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of health, safety, and the general welfare of the people. The legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction.

Const 1963, art 4, § 52. In response, the Legislature enacted MEPA and included within it a provision allowing "any person" to bring suit. National Wildlife argues and various amici echo its belief that this bold approach granted standing without a showing that the litigant is actually injured. In support of this, they point only to article 4, § 52. But nothing in the text of that provision dispenses with standing or creates a universal right to litigate the protection of air,

water, and other natural resources in the courts. The provision merely obligates the Legislature to enact statutes to provide for the protection of natural resources.

When the drafters of the Michigan Constitution have intended to alter the normal limits on judicial power by expanding or dispensing with the standing doctrine. They have done so specifically. Thus, when the drafters of the Michigan Constitution sought to deviate from the normal standing requirements, they specifically included language authorizing the courts to act. For example, in article 3, § 7, the Constitution allows "[e]ither house of the legislature or the governor ... [to] request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." Const 1963, art 3, § 7. If the "judicial power" did not limit the judiciary to deciding controversies between injured parties, there would have been no need for this provision.

Similarly, when the Headlee Amendment was adopted, the text specifically created taxpayer standing to enforce the provisions of article 9, §§ 25 through 31. Article 9, § 32 provides:

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

Const 1963, art 9, § 32. Because the normal limits of the "judicial power" when read together with the other vesting clauses would have prevented such a suit, the amendment included this specific provision affording standing. Again, it would not have been required if National Wildlife's position is correct.

Finally, Professor Sax suggests that article 6, § 13 provides for standing without a showing of injury. Article 6, § 13 provides:

> The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court.

Mich Const 1963, art 6, § 13. It is not apparent that this provision allows for suits in the absence of a showing of the judicial test for actual injury. But if it does, it could only be on the basis of the last clause allowing for "jurisdiction of other cases and matters as provided by rules of the supreme court." *Id.* Perhaps this was the basis for the acceptance of jurisdiction by court rule under MCR 2.201(B)(4)(a). In any event, it affords no authority here because no judicial rule created jurisdiction here.

Nothing in article 4, § 52 discusses standing or authorizes the judiciary to hear suits of any citizen. Instead, the language simply mandates that the legislature provide for the protection and conservation of natural resources of the state. And nothing in MEPA identifies or creates an individuated concrete interest. Instead, it purports to confer standing on any citizen to bring suit.

Amici Joseph L. Sax argues that MEPA's citizen suit provision followed from the publicity over Rachel Carson's book, Silent Spring, and from unsuccessful citizen efforts to prevent the use of DDT and a similar product. (Brief on Appeal of Joseph L Sax, pp 1-3). Professor Sax reminds the Court that the statute was intended to provide a remedy to prevent the problems that litigants had encountered in *Yannacone v Dennison*, 285 NYS2d 476 (Sup Ct, 1967) where the court rejected the claim of a duty to preserve local natural resources because it was "too nebulous." *Id.* Professor Sax argues that the legislature did what Justices Kennedy and Souter had in mind in *Lujan*—they defined injuries and articulated a chain of causation that would give rise to a controversy where none existed before. But nothing in this "legislative

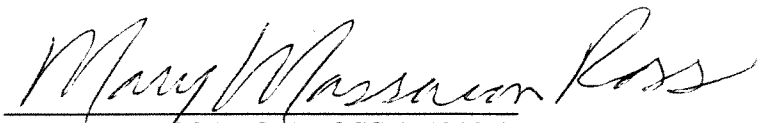
history" of the events leading to the enactment of MEPA identifies the specific individuated interest that the statute purportedly defined. The legislative provisions that Professor Sax discusses do not set forth language creating a concrete interest as described in *Lujan*. Instead, the legislature did exactly what *Lujan* disallowed. It purported to confer standing on any citizen to challenge executive action. That is impermissible. This Court should therefore reverse the Court of Appeals and reinstate the ruling of the trial court dismissing the action for lack of standing.

RELIEF

WHEREFORE, Defendants-Appellants, The Cleveland Cliffs Iron Company and Empire Iron Mining Partnership, by and through its attorneys, Plunkett & Cooney, P.C., respectfully request that this Court reverse the Court of Appeals' decision and reinstate the Marquette County Circuit Court's January 30, 2001 order dismissing plaintiffs' case in its entirety based on plaintiffs' lack of standing.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

BY: 

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DATED: December 4, 2003

STATE OF MICHIGAN

IN THE SUPREME COURT

NATIONAL WILDLIFE FEDERATION & UPPER PENINSULA ENVIRONMENTAL COUNCIL,

Plaintiffs-Appellees,

vs

CLEVELAND CLIFFS IRON COMPANY & EMPIRE IRON MINING PARTNERSHIP,

Defendants-Appellants,

and

MICHIGAN DEPT OF ENVIRONMENTAL QUALITY, a Michigan Executive Agency and RUSSELL J. HARDING, Director of the Michigan Department of Environmental Quality,

Defendants,

Supreme Court
No. 121890

Court of Appeals
No. 232706

Marquette County Circuit Court
No. 00-037979-CE

PROOF OF SERVICE

STATE OF MICHIGAN }
} ss
COUNTY OF WAYNE }

CHRISTINE M. WARNEZ, being sworn, states that on December 4, 2003, she served a copy of Defendants-Appellants' Reply Brief, on NEIL S. KAGAN, Attorney for Plaintiffs-Appellees, 213 West Liberty Street, Suite 200, Ann Arbor, MI 48104; and HAROLD J. MARTIN, Attorney for MEPA, Assistant Attorney General, 110 State Office Building, Escanaba, MI 49829, by depositing same in the United States mail with postage fully prepaid.

CHRISTINE M. WARNEZ

Subscribed and sworn to before me
on December 4, 2003.

Christine Borghi
Notary Public, Wayne County, MI
My Commission Expires 9/2/2005

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